

**MOTION TO PRECLUDE DEFENSE WITNESSES, EXHIBITS, AND DEFENSES, OR,
IN THE ALTERNATIVE, MOTION FOR SANCTIONS AGAINST DEFENSE COUNSEL**

Criminal Rule 15 – The defense failed to provide a timely list of witnesses/evidence /defenses, so the defense should be precluded from calling those witnesses, presenting that evidence, or raising those defenses.

The State of Arizona, by the undersigned Deputy County Attorney, and pursuant to Rule 15.7, Arizona Rules of Criminal Procedure, requests this Court to preclude the defendant from calling witnesses, introducing evidence, or raising defenses at trial that have not been timely disclosed under Rule 15.2(b) and (c), Ariz. R. Crim. P. In the alternative, the State asks this Court to impose sanctions against defense counsel for failing to comply with the Rules of Criminal Procedure. This motion is supported by the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant was arraigned on [arraignment date]. Initial discovery, consisting of police departmental reports (and any other discovery materials that were given to the defense at arraignment), was given to defense counsel by the State at the arraignment on [arraignment date], ten days before Rule 15.1 requires the State to provide the defense with that material. (The State then timely filed the remainder of its Rule 15.1 disclosure on [date].) Trial is now set for [trial date]. The "last day" for trial is [last day]. As of [today's date], the date of this motion, the defense has not filed the disclosure that Rule 15.2 requires the defense to file within 20 days of the arraignment. The defense's disclosure is [number of days, weeks, etc.] past due. The State filed a motion to compel discovery on [motion date], but still the defense has not provided the State with the notice of defenses, the names and addresses of witnesses, or any notice of which witness [he/she] expects to call concerning each defense. Since [the Public Defender's

Office] OR [defense counsel] was [appointed] OR [retained] to represent the defendant, the defense has [never provided any of] OR [provided only some of] the discovery that Rule 15.2, Ariz. R. Crim. P., requires the defense to disclose. [This defendant is in custody; therefore, under Rule 8.2(b), Ariz. R. Crim. P., [he/she] must be tried within (90 days of [his/her] arraignment) OR (120 days of [his/her] initial appearance).] OR [This defendant is not in custody; therefore, under Rule 8.2(c), Ariz. R. Crim. P., [he/she] must be tried within (120 days of [his/her] arraignment) OR (90 days after [his/her] initial appearance).] In addition, under Rule 8.2(a), Ariz. R. Crim. P., [he/she] must be tried within 150 days of [his/her] arrest or service of summons. A violation of these speedy trial rules requires a dismissal of the case. Rule 8.6, Ariz. R. Crim. P.

The Maricopa County Superior Court has recently announced a policy that will substantially limit the number and length of continuances granted for discovery problems. In this case, the defense's failure to comply with the discovery rules has detrimentally affected the State's ability to proceed to trial within the strict time limits established by Rule 8. Therefore, the State asks this Court to preclude the defendant from calling witnesses, introducing evidence, or raising defenses that were not disclosed within the time limits prescribed by Rule 15.2. In the interest and spirit of the strict time limits imposed by Rule 8, the State requests that this Court order the sanction of preclusion rather than granting a continuance. The State is entitled to time to interview the defendant's witnesses and investigate the noticed defenses even if they are disclosed by order of the Court after they are past due. Thus, ordering late disclosure of overdue discovery matters will only result in the same delay as a continuance. Preclusion of non-disclosed witnesses, evidence, and defenses is the

appropriate remedy. Preclusion will ensure that the Court can enforce the spirit and purpose of Rule 8, namely, to expedite criminal trials and force both the State and the defense to proceed to trial without the long delays that were possible before Rule 8 was implemented. See *Schultz v. Peterson*, 22 Ariz. App. 205, 207, 526 P.2d 412, 414 (App. 1974). The underlying principle of the disclosure rule is avoidance of undue delay or surprise. *State v. Rienhardt*, 190 Ariz. 579, 586, 951 P.2d 454, 461 (Ariz. 1997), *cert. denied*, *Rienhardt v. Arizona*, 525 U.S. 838 (1998). Rule 15.2(b) mandates that within 20 days after the arraignment in superior court, the defendant shall file a written notice specifying all defenses which the defendant will introduce at trial. The defendant is also required to "specify for each defense the persons, including the defendant, whom the defendant will call as witnesses at trial in support thereof." As the Arizona Supreme Court has stated, "The Rules of Criminal Procedure facilitate the exchange of information between the State and an accused in order to avoid surprise, delay, and to sharpen and narrow the issues for trial." *State ex rel. Baumert v. Superior Court*, 133 Ariz. 371, 373, 651 P.2d 1196, 1198 (1982). When the defense files a general list of defenses, but does not disclose witnesses who will testify as to those defenses, the notice of defenses in essence is meaningless because it does not allow the State an opportunity to investigate those alleged defenses. Similarly, when the defense merely discloses "anyone listed in the police departmental records," the disclosure is "so general as to be tantamount to no disclosure at all." See generally *State v. Smith*, 123 Ariz. 243, 251, 599 P.2d 199, 207 (1979).

If either side fails to comply with any provision of Rule 15, the Court can impose any sanction it finds just under the circumstances, pursuant to Rule 15.7, Arizona Rules

of Criminal Procedure. The decision whether to impose sanctions and the choice of sanctions for a discovery violation is within the sound discretion of the trial court. *State v. Dumaine*, 162 Ariz. 392, 406, 783 P.2d 1184, 1198 (1989). The possible sanctions this Court could impose include, but are not limited to, the following:

1. Ordering disclosure of the information not previously disclosed.
2. Granting a continuance.
3. Holding a witness, party, or counsel in contempt.
4. Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and
5. Declaring a mistrial when necessary to prevent a miscarriage of justice.

Rule 15.7(a), Arizona Rules of Criminal Procedure.

The State recognizes that preclusion of the evidence is only rarely an appropriate sanction for a discovery violation. *State v. Towsley*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). Because preclusion impinges on a defendant's Sixth Amendment right to present witnesses in his own defense, it should be used only as a last resort. *Taylor v. Illinois*, 484 U.S. 400, 411-15, 108 S.Ct. 646, 654-56, 98 L.Ed.2d 798 (1988); *State v. Valencia*, 186 Ariz. 493, 502, 924 P.2d 497, 506 (App. 1996); *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App.1993). Nevertheless, preclusion of evidence or witnesses does not require bad faith. When counsel is dilatory and negligent in not doing what is clearly provided by the rules of discovery, preclusion is a proper remedy. *State v. Killeen*, 185 Ariz. 270, 271, 915 P.2d 1225, 1226 (1996). The court may insist on an explanation for a party's failure to comply with a request to identify witnesses prior to trial. See *Taylor v. Illinois*, 484 U.S. 400, 415, 108 S.Ct. 646, 661, 98 L.Ed.2d 798

(1988). In *Taylor*, the defendant argued that the compulsory process clause of the Sixth Amendment prohibited preclusion of defense witnesses as a sanction for violating a discovery rule. The United States Supreme Court disagreed and found preclusion of the defense witnesses to be an appropriate sanction and was justified to protect the integrity of the judicial process. *Taylor* adopted a balancing test to consider the issue, stating:

In order to reject petitioner's argument that preclusion is *never* a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Taylor, 484 U.S. at 415, 108 S.Ct. at 656 [emphasis in original].

In considering what sanctions to impose, the Arizona Supreme Court has also provided instruction:

[T]he trial court should consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by continuances, and any other relevant circumstances.

State v. Scott, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975). In *Scott*, the Court of Appeals found it appropriate to consider the circumstance that the trial court's calendars were congested. The court held that although the defendant had a genuine need for the testimony of two witnesses who had not been disclosed to the prosecutor, and whose

testimony would have been relevant to the issue of whether the defendant was too drunk to form the requisite specific intent, the trial court did not abuse its discretion in precluding such testimony, stating:

We are aware that the court could have continued the trial to allow the prosecutor additional time. In view of the heavy court congestion at the time, however, we believe it was well within the trial court's discretion to refuse to do so.

Id. at 205, 537 P.2d at 42.

In *State v. Fierro*, 124 Ariz. 182, 603 P.2d 74 (1979), the court also upheld the trial courts' actions in precluding the defendants from calling witnesses whose identities they had not disclosed to the prosecution as required by Rule 15.2. As the *Fierro* court explained:

[D]ue to the failure of the defendant to abide by the requirements for discovery contained in Rule 15.2, the trial court properly prohibited this evidence [about favorable police treatment of a state witness] from being admitted.

124 Ariz. at 188, 603 P.2d at 80.

For all of the reasons discussed above, the State requests that this Court preclude the defendant from calling witnesses, introducing evidence, or raising defenses at trial because the defense failed to comply with Rule 15.2, Ariz. R. Crim. P. In the alternative, the State asks this Court to impose sanctions on defense counsel for counsel's willful and unexplained failure to comply with [his/her] duties under Rule 15.2, Ariz. R. Crim. P. If this Court decides to continue this case so that the defense may provide the untimely disclosure, the State requests that the Court exclude all time from the twentieth day after arraignment until the date the defendant complies with the discovery rules and files the Rule 15.2 mandated disclosure. Rule 8.4(a), Ariz. R. Crim.

P., provides that the period of time for a delay occasioned by or on behalf of the defendant *shall* be excluded from computation of Rule 8 time limits. Any delay in this case will be the defense's responsibility, so this Court should exclude all such delay from the computation of the defense's speedy trial rights.